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SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 367.

BROOKS-SCANLON CORPORATION,
Appellant.

vs.

THE UNITED STATES,
Respondent,

BRIEF OF BROOKS-SCANLON CORPORATION, APPELLANT.

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SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 367.

BROOKS-SCANLON CORPORATION,
Plaintiff and Appellant,

vs.

THE UNITED STATES,
Defendant and Respondent.

This action is here on appeal by both parties from the judgment of the Court of Claims entered April 23rd, 1923, in favor of the plaintiff for $231,549.12.

It involves the determination of the measure and amount of just compensation to which the plaintiff is entitled for the requisition by the Government on August 3rd, 1917, of a steamship under construction, and the taking and appropriation by the United States of plaintiff's contract with the builder for the construction of this ship.

The plaintiff claimed that the value of its contract and of its rights and interests under it on the date of the requisition with interest was the measure of just compensation.

The Court of Claims adopted as the measure the portion of the contract price which plaintiff had paid to the builder, plus the amount it had paid to architects and for plans and specifications, that is the amount of money expended by the plaintiff for those purposes and interest thereon from the date of the requisition.

Upon that measure the judgment is based.

The theory upon which that Court reached its conclusion is that under the police power of the government this contract was merely made unenforcible as between the parties to it—frustrated not taken.

The plaintiff's contention was in that Court and is here that the plaintiff's contract and its rights and interests under it were taken and appropriated by the United States for public use under its right of eminent domain, not frustrated merely.

STATEMENT.

Brooks-Scanlon Corporation, the plaintiff sought to recover in the Court of Claims $1,307,270 as just compensation for the requisition and taking on August 3rd, 1917, by the President for the use of the United under the act of Congress of June 15, 1917, (40 Statutes at Large, page 182), of a contract then owned by the plaintiff for the construction for it by the New York Shipbuilding Corporation, as builder, at Camden, New Jersey, of a steamship of the capacity of 8,597 dead weight tons, and the taking of this ship then in process of construction under this contract.

This contract was in writing and made March 28th, 1916, between New York Shipbuilding Company, the builder, and East Coast Transportation Co. called therein the owner, and provided that the Shipbuilding Company, or its assigns, would build for the Transportation Company, or its assigns, according to plans and specifications which were made a part of the contract, a steam ship of about 8,100 d. w. t., and deliver the same at Camden, New Jersey, on or before February 1st, 1918, for $595,000.00, which the Transportation Company agreed to pay in specified installments as the work progressed. (Record page 9; 33-37.)

This contract also provided that alterations might be made in the construction by agreements in writing; that the builder would afford every facility for inspection by the owner of workmanship and material as the work progressed, and that the builder at its own cost would keep the ship

insured until completed and delivered in an amount at least equal to partial payments made and cause the loss if any to be made payable to the parties as their interests might appear. (p. 35.)

Prior to May 25th, 1917, changes in the construction of this ship were agreed upon in writing increasing its capacity to 8,597 d. w. t., and the contract price to $831,630. (p. 10.) (p. 18.)

On May 24th, 1917, the East Coast Transportation Co. assigned this contract to Carpenter-O'Brien Co., a corporation, the name of which was changed December 8th, 1917, to Brooks-Scanlon Corporation, the plaintiff. (p. 10.)

On December 16th, 1916, the New York Shipbuilding Co. transferred and assigned all its right, title and interest in this contract to New York Shipbuilding Corporation. (p. 9.)

By Act approved June 15, 1917, and entitled, "An act making appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30th, 1917, and for other purposes," congress authorized and empowered the President to requisition any existing or future contract for the building of ships, and to requisition any ship in process of construction, and to exercise this power through such agency or agencies as he might determine.

This Act expressly provides that whenever the United States shall cancel, modify, suspend or requisition *any contract* it shall make just compensation therefor. (40 Statutes at Large, p. 182.)

On July 11, 1917, the President by an Executive order, delegated the powers conferred on him by

that act to the United States Shipping Board Emergency Fleet Corporation. (p. 10.)

On August 3rd, 1917, the Emergency Fleet Corporation issued and served upon the builder, New York Shipbuilding Corporation, a notice and order of requisition directed to it, and containing this language:

> "All power-driven, cargo-carrying, and passenger ships, above 2,500 tons d. w. t. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.
>
> "On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction, and will prosecute such work with all practicable dispatch.
>
> "The compensation to be paid will be determined hereafter and will include ships, materials, and *contracts* requisitioned.
>
> "You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of *contracts* and all supplemental agreements in relation thereto, and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and *contracts.*" (p. 10-11.)

Among the ships included within this requisition order was the ship described in the plaintiff's contract known as Hull No. 193, and afterwards as the ship M. J. Scanlon, in process of construction under that contract, in the yards of the Shipbuilding Corporation. (p. 10.)

August 18, 1917, this notice and order was served on East Coast Transportation Company, and on August 28, 1917, upon Carpenter-O'Brien Co., the plaintiff, whose name is Brooks-Scanlon Corporation. (p. 11.)

On August 22, 1917, the Emergency Fleet Corporation served on the New York Shipbuilding Corporation a notice and order containing the following, viz;—

> "The ships now under construction at your plant and referred to above having been requisitioned by the duly authorized order of this corporation and title thereto taken over by the United States, and an order having been placed with you by due authority to complete the construction of said ships with all practicable dispatch, you are further ordered by the President of the United States, represented by this corporation to proceed in the work of completion heretofore ordered, *in conformity with the requirements of the contract, plans, and specifications* under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said *contract* describes the ship, the materials, machinery, equipment, outfit, workmanship, *insurance*, classification, and survey thereof, including the meeting of the requirements of the said contract and all tests as to efficiency and

capacity of the ship on completion, and in so far as the *contract contains provisions for the benefit and protection of the persons with whom the contract was made,* but not otherwise.

"All work will proceed under the inspection of such persons as have been or may hereafter, from time to time, be designated by this corporation for that purpose.

"For the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the *contract* and not yet paid." (p. 14-15.)

On September 20, 1917, the Shipbuilding Corporation answering this notice and order stated that it understood that under the act of June 15, 1917, and the Executive order of the President of July 11, 1917, it was under obligation to comply with the order of requisition of August 3rd, 1917, to complete the construction of this ship and that upon completion and acceptance of the same, and upon complete payment by the Emergency Fleet Corporation with such additional compensation as might be agreed upon, it would execute and deliver to the United States a bill of sale conveying all its right, title and interest in the vessel without prejudice to any claim of the person or corporation who originally contracted for the construction of the vessel and those claiming rights under the original contractor.

On September 13, 1917, the Emergency Fleet Corporation instructed the Shipbuilding Corporation to accept no further payments from the former

owners on account of requisitioned ships, and notified the plaintiff of this instruction. (p. 16.)

The East Coast Transportation Company immediately after the construction contract was made, made a contract with Bureau Veritas for its inspection and classification service, which was continued by the plaintiff, and this service was furnished from the commencement of the construction to its completion. (p. 17.)

Neither party was ever in default in the performance of its part of the construction contract. On the date of the requisition the builder had in its yard or under commitments the material, equipment and outfit required to build and complete the ship according to the contract, and it was thereafter all used for that purpose. No further material was purchased except to the extent of $31,000 for material for the military protection of the vessel.

The plaintiff had the money with which to pay to the builder all the unpaid installments of the contract price and this money was on deposit in solvent banks and held for that purpose. (p. 16-17.)

On August 3rd, 1917, this ship was about nineteen per cent completed, and its construction was thereafter completed in accordance with the plaintiff's contract and the plans and specifications which were a part of it without any change except that above mentioned for the military protection of the vessel. It was launched July 6, 1918, and delivered to the United States September 20, 1918. (p. 17.)

These plans and specifications were ordered and paid for by the plaintiff and its assignor, and they were used after August 3rd, 1917, by and for the benefit of the Emergency Fleet Corporation in the construction and completion of the ship. The value of the same was $20,277.25. (p. 18.)

On December 8, 1917, the Emergency Fleet Corporation agreed with the Shipbuilding Corporation, to pay it a bonus of $10.00 per dead weight ton in addition to the cost of construction of this ship from the date of commencement to the time of completion crediting however in favor of the Fleet Corporation all sums received on account of the construction either from the former owners or from the Fleet Corporation, and the Shipbuilding Corporation on its part agreed to complete this ship *in accordance with the specifications annexed to the contract,* and to take no additional contracts for other ships from parties other than the United States which would interfere with expedition.

The Fleet Corporation also agreed to *indemnify* and hold harmless the Shipbuilding Corporation from all loss or liability occasioned by the requisition order of August 3, 1917, or any subsequent act or order given by the Fleet Corporation arising out of claims of the former owner or owners, or any one claiming under them. (p. 18-20.)

In accordance with the provisions of said Act of June 15, 1917, the plaintiff filed its claim for the payment of just compensation for the property requisitioned and taken from it on August 3, 1917, with the Emergency Fleet Corporation.

On January 23, 1920, the Fleet Corporation awarded the plaintiff as just compensation the sum of $442,683.82. The plaintiff refused to accept this award and so notified the Emergency Fleet Corporation, and on February 24, 1920, the defendant paid to the plaintiff 75% of the award, which was $332,012.87. (p. 21.)

Before August 3rd, 1917, the plaintiff and its assignor had paid to the New York Shipbuilding Corporation of the contract price $239,500.00 in cash, and $180,000.00 in notes which it paid, and $28,433.33 interest on notes, in all $447,933.33. It also paid $5,500.00 to architects, and for plans and specifications $20,277.25, making in all the sum of $473,710.58. It has been paid by the defendant as above stated $332,012.87.

The plaintiff and its assignor paid to the builder prior to August 3rd, 1917, $419,500 of the contract price. The Emergency Fleet Corporation appropriated this amount and paid to the builder $412,130 which was the unpaid balance of the contract price.

The market value of this ship on August 3rd, 1917 was $200 per dead weight ton, or $1,719,400.

Its value February 1st, 1918, the date on which it was to have been and but for the requisition of it would have been completed and delivered to the plaintiff under the contract was the same amount.

The Court below found as a conclusion of law that the plaintiff was entitled to recover as just compensation for this requisition and taking, the portion of the contract price which the plaintiff and its assignor had paid to the builder prior to

August 3rd, 1917, the date of requisition, $5,500 paid to architects, and $20,277.25 for plans and specifications, or $473,710.58, in all, less the sum of $332,012.87 received by it from the defendant February 24, 1920, and in addition thereto as damages interest at six per cent per annum.

The plaintiff claimed that the measure of the just compensation to which it was entitled was the value of its contract on August 3rd, 1917, and not merely the amount it had paid the builder and expended on it prior to that date.

ASSIGNMENTS OF ERROR.

I.

The Court of Claims erred in its conclusions of law that just compensation to the plaintiff was the portion of the contract price for the ship which had been paid to the builder before August 3, 1917, the date of the requisition, and the amount paid to architects and for plans and specifications.

The Conclusions of law from the facts found should have been that the just compensation to which the plaintiff is entitled is the value to it on that day of its contract and interest thereon.

II.

The Court erred in its conclusion of law that the measure of plaintiff's damages for the requisition and taking by the United States of the plaintiff's contract and the ship described in it was merely the amount of money which had been paid and expended by the plaintiff on and under the contract prior to the date of the requisition, and in addition interest thereon.

III.

It erred in this; that its conclusions of law do not follow from and are not nor is the judgment justified by the findings of fact. For the conclusions of law should have been that the plaintiff is entitled to recover the sum of $1,307,270, the value

of its contract and its rights under the same on August 3rd, 1917, less $332,012.87 the amount paid by defendant February 24th, 1920, that is $975,257.13 and in addition interest at 6%.

ARGUMENT.

The plaintiff's contract was property, and was within the protection of the clause of the 5th Amendment to the Constitution, "Nor shall private property be taken for public use without just compensation."

The United States had the power to condemn, requisition and take for public use this contract subject to this limitation and upon the condition that just compensation be made and not otherwise.

By the Act of June 15, 1917, congress authorized the President to requisition ships under construction and contracts for their construction, and expressly provided that the United States should make just compensation therefor.

It also provided that the President might delegate the power vested in him by this act. He did delegate the same to the Emergency Fleet Corporation.

On August 3rd, 1917, the United States acting through the Emergency Fleet Corporation requisitioned, appropriated and took for public use the plaintiff's contract, and all its rights and interests thereunder as well as the ship itself therein de-

scribed, and the material provided for its construction.

The plaintiff is entitled to recover the value to it on August 3rd, 1917, of this contract and these rights and interests as just compensation therefor.

I.

Plaintiff's Contract Was Property.

That a contract is property and is within the protection of the 5th Amendment to the Constitution, and that the power of the United States under its right of eminent domain to condemn or take it for public use is subject to the condition that just compensation be made is too well settled by the following authorities, among others, to require argument.

Monongahela Navigation Co. vs. United States, 148 U. S. 312.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685.

New Orleans Gas Light Co. vs. Louisiana Light, H. P. & Mfg. Co. 115 U. S. 650; 673.

Cincinnati vs. Louisville & Nashville R. R. Co. 223 U. S. 400-401.

West Bridge Co. vs. Dix, 6 Howard 507.

C. B. & Q. Ry. Co. vs. Drainage Commissioners, 200 U. S. 561; 593.

In the last case cited above the Court said:

"If in the execution of any power, no matter what it is, the Government, federal or state,

finds it necessary to take private property for public use it must obey the constitutional injunction to make or secure just compensation to the owner." Page 593.

II.

The President Was Authorized to Requisition Plaintiff's Contract.

Congress by the Act of June 15, 1917, conferred this authority upon him in definite terms.

"The president is hereby authorized and empowered within the limits of the amounts herein authorized—

(b) to modify, suspend, cancel or requisition any existing or future contract for the building, production or purchase of ships or material.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy or requisition, acquire or take any plant or part thereof, or any ship, charter or material in accordance with the provisions hereof, it shall make just compensation therefor to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid 75% of the amount so determined by the President, and shall be entitled to sue the Unied States to recover such further sum as added to said 75% will make up such amount as will be just compensation therefor, in the manner provided for by Section 24, paragraph 30, and Section 145 of the Judicial Code.

The President may exercisethe power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine."

III.

The Contract Was Taken.

The contention of the United States is that it requisitioned the ship under construction and the material for building it only, and that it did not take the plaintiff's contract, or any right or interest it had in the ship under that contract.

The plaintiff insists that its contract and all its rights and interests under it were taken.

The Court of Claims found as facts that on August 3rd, 1917, the plaintiff was the owner of the construction contract in the Findings described under which the New York Shipbuilding Corporation had obligated itself to build according to plans and specifications which formed a part of the contract, and to deliver to the plaintiff on or before February 1st, 1918, the steam ship described therein, and then known as Hull 193 of the capacity of 8,597 d. w. t. tons, for the contract price of $831,630, which the plaintiff had obligated itself to pay therefor, and that this ship was then in process of construction in the yard of the Shipbuilding Corporation, and about 19% completed.

Neither party was in default under this contract. The plaintiff had paid $419,500 of the con-

tract price, and was ready and able to pay the balance.

The Shipbuilding Corporation was ready and able to comply with the contract on its part, and to complete and deliver the ship. It had in its yard and under commitment the material required to complete the construction, and the same was thereafter used for that purpose.

On August 3rd, 1917, the Emergency Fleet Corporation served on the Shipbuilding Corporation, and on August 28, 1917, upon the plaintiff, the notice of requisition which appears on page 11 of the record, and therein ordered the Shipbuilding Corporation to complete the construction of this ship.

On August 22nd, 1917, the Emergency Fleet Corporation served upon the Shipbuilding Corporation the order on pages 14 and 15 of the record, in which it said:

> "You are further ordered by the President of the United States represented by this Corporation to proceed in the work of completion heretofore ordered *in conformity with the requirements of the contract, plans and specifications* under which construction proceeded prior to the requisition of August 3rd, 1917, in so far as the said *contract* describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification and survey thereof, including the meeting of the requirements of the said *contract* and all tests as to efficiency and capacity of the ship on completion and in so far as the *contract* contains provisions for the benefit and pro-

tection of the person with whom the contract was made.

For the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the *contract* and not yet paid."

On September 13, 1917, the Emergency Fleet Corporation directed the Shipbuilding Corporation to receive no further payments from the plaintiff, and notified the plaintiff of this direction. (p. 16.)

The Emergency Fleet Corporation paid to the Shipbuilding Corporation for the completion of the construction $412,130, which was the balance of the contract price unpaid on August 3rd, 1917, and took credit for and appropriated to its own use the $419,500 which the plaintiff had paid thereon prior to that date.

From the Findings of Fact it necessarily follows as a conclusion of law that, the United States did take over, appropriate and use the plaintiff's contract and all its rights thereunder.

1st:—

In the notice dated August 3rd, 1917, addressed to the builder the Emergency Fleet Corporation says:

"All power-driven, cargo-carrying and passenger ships above 2,500 tons d. w. t. capacity under construction in your yard and certain machinery, equipment, outfit and commitments for materials, machinery, equipment and outfit necessary for their completion are hereby requisitioned by the United States.

> You are hereby required TO COMPLETE THE CONSTRUCTION of said requisitioned ships under construction and will prosecute such work with all practicable dispatch.
>
> The compensation to be paid will include ships, materials and CONTRACTS requisitioned."

It then directs the builder to furnish plans and specifications, copies of contracts, particulars as to payments made, name of owner and date of completion, amounts still due, and all information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and CONTRACTS.

This order "to complete the construction of the ship" was manifestly an order to finish the construction which the builder had begun in accordance with the contract. The builder could not "complete the construction" without the use of the contract and plans and specifications, nor could the Emergency Fleet Corporation ever determine whether the construction had been completed without them.

The compensation to be paid included ships and CONTRACTS.

The builder was directed to furnish copies of CONTRACTS and

> "any other information necessary to a determination of the obligations of the Emergency Fleet Corporation in taking over these ships and CONTRACTS."

The order of August 22nd, is still more specific and directs the builder "to proceed in the work of completion heretofore ordered in conformity with the requirements of the CONTRACT, PLANS and SPECIFICATIONS under which construction proceeded prior to the requisition of August 3rd, 1917, in so far as said contract describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification and survey thereof, including the meeting of the requiremnets of said CONTRACT and all tests as to efficiency, capacity of the ship on completion, and in so far as the contract contains provisions for the benefit and protection of the person with whom the CONTRACT was made.

All work will proceed under the inspection of such persons as have been or may hereafter from time to time be designated by this Corporation for that purpose.

For the work of completion heretofore and herein ordered the Corporation will pay to you amounts equal to payments set forth in the contract and not yet paid." (p. 15.)

Here is a positive recognition of the existence of the contract, and a statement that the United States took the place of the plaintiff under it, and would designate the inspectors and make the "payments set forth in the contract and not yet paid." Here is also a positive direction to the Shipbuilding Corporation to proceed with the completion of the construction in "conformity with the require-

ments of the contract, plans and specifications" in every respect except that it was to receive from the Emergency Fleet Corporation unpaid payments of the contract price and directions as to inspection.

The inspection service had been furnished by Bureau Veritas under a contract with the plaintiff and its assignor, and this service was in fact continued and furnished by the same party from the commencement of the construction until its end. (P. 14; 17.)

On September 13, 1917, the Emergency Fleet Corporation directed the Shipbuilding Corporation to accept no further payments from the plaintiff, and notified the plaintiff of this direction.

The construction of the ship proceeded under these orders of the Fleet Corporation for about four months when that Corporation made a contract dated December 8, 1917, again requiring the builder to complete the construction of this Hull 193 and others, "in accordance with the specifications annexed to the respective contracts under which said hulls were being constructed prior to August 3rd, 1917," and agreeing to pay the builder a bonus of $10.00 per d. w. t. ton, and providing that the Fleet corporation should have credit for all sums theretofore received by the Shipbuilding Corporation from former owners. It also agreed to indemnify the Shipbuilding Corporation from all loss or liability occasioned by the requisition order of August 3rd, 1917, or any other act or order of the Fleet Corporation arising out of claims of the

former owner or owners, or any one claiming under them. (p. 19; 20.)

This contract does not change the situation at all so far as the plaintiff's rights are concerned.

The plans and specifications were a part of the plaintiff's contract and a material and necessary part of it in the work of completion of the construction, and this agreement of December 8th really reaffirms the existence of that contract.

The defendant made itself the successor of the plaintiff under the contract—the owner of plaintiff's rights. It could have become such owner in no way other than by the condemnation and taking of the contract.

The defendant did not cancel this contract. It kept it alive and used it with every obligation of the Shipbuilding Corporation under it.

Chief Justice Campbell of the Court of Claims in his opinion in this case at page 30 of the Record says:

> "In other words, the Fleet Corporation agreement was to have the vessel completed in accordance with plaintiff's contract, plan, and specifications; to pay therefor plaintiff's contract price (with a bonus added) and then, in settlement for the completed vessel, to take credit to itself for the amounts plaintiff has paid. And this plan was consummated. Another provision of this contract was that the Fleet Corporation agreed to indemnify and save harmless the builder from any and all loss or liability occasioned by reason of the 'requisition order of August 3,' or any subsequent acts or orders given by the Fleet Cor-

poration 'arising out of claims of the former owner.' "

If the plaintiff had voluntarily assigned its contract with the builder to the Government, and the latter had expressly assumed the unfulfilled obligations and, later received the completed vessel, it would not more effectively have acquired plaintiff's contract, its rights, and obligations than actually resulted from what was done in this case. The Government requisitioned the incomplete vessel with the purpose of requiring the completion in accordance with the existing contract; it did require the carrying out of that contract (with slight modification); it took plaintiff's right to have the vessel; it received the vessel and appropriated plaintiff's partial payments thereon to its own use and benefit. The contract was performed; the vessel was delivered. I think the plaintiff's contract was taken and appropriated."

2nd:—

The natural, direct and inevitable effect of what the defendant did was the appropriation by the defendant of plaintitff's contract for public use.

When the defendant displaced the plaintiff under this contract and took that place itself, and exercised all the rights the plaintiff had under it, and agreed to pay to the builder and did pay the balance of the installments of the contract price unpaid at the time of the requisition on August 3rd, 1917, it took over and appropriated this contract and all the rights and interests the plaintiff had in it.

The defendant could not requisition and take the uncompleted ship, as it did do, and order the builder to complete the construction of it in accordance with this contract and the plans and specifications which were a part of it, pay the builder the balance of the contract price unpaid, and appropriate the amount which had been paid by the plaintiff, and receive from the buider the ship completed in accordance with the contract with no change whatever except a slight change for the military protection of the vessel, without taking this contract within the meaning of the 5th Amendment.

No other conclusion can follow from the facts found.

For the defendant took and used the plaintiff's plans and specifications, its service of inspection and classification of the vessel, its insurance while under construction, the guaranty of materials and labor, the vessel when completed, the payments made by the plaintiff to the builder, all of which were valuable rights of the plaintiff under the contract, and there was no provision of the Act of June 15, 1917, under which these rights could have been taken without taking the contract itself. They were essential parts of the contract and could not have been separated from it.

The defendant could not have used these rights as it did unless it had taken the contract itself.

3rd:—

Although under this contract the legal title to the ship during its construction was in the Ship-

building Corporation the plaintiff then had such substantial rights and equities in the uncompleted ship as the courts recognize and protect.

The parties to the contract evidently understood this for they provided in it that the builder should keep the vessel insured at all times during the construction in an amount at least equal to payments made by the plaintiff with loss if any payable as their interests might appear.

A ship is personal property of such peculiar character that both in England and in this country an action for specific performance of contracts relating to it will lie.

Lynn vs. Chaters, 2 Keen 521.
Claringbold vs. Curtis, 21 L. J. Ch. N. S. 541.
Duff vs. Fisher, 15 California 381.
Peer vs. Kean, 14 Mich. 354.
Menier vs. Donald, 165 N. Y. Supp. 50.
Great Lake & St. L. Transportation Co. vs. Scranton Coal Co. 239 Fed. 603.
L. R. A. 1918 E, 621.

In Menier vs. Donald, decided in 1917, upholding a decree for the specific performance of a contract for the sale of a steamship, the court said that there is authority both in this country and in England for the proposition that a ship is a special kind of personalty which in itself may justify a decree for specific performance, but added that even if this were not so the allegations of the complaint as to the peculiar value of the ship to the plaintiff, and the difficulty of replacing it or deter-

mining its value, and his damages under present conditions (referring apparently to the conditions created by the war), were amply sufficient to sustain the complaint.

In Lynn vs. Chaters, it was held that specific performance would lie at the instance of the vendors to enforce a contract for the sale of a ship.

In Claringbold vs. Curtis, specific performance was granted at the instance of the purchaser of a contract for the sale of a barge.

In Peer vs. Kean, the court upheld the right to specific performance of an agreement for the conveyance of a one-half interest in a boat, and alluded to the fact that the property was of peculiar nature, difficult of valuation or substitution.

In Great Lake & St. L. Transportation Company vs. Scranton Coal Co., the Circuit Court of Appeals of the 5th Circuit affirmed a preliminary injunction granted at the instance of the plaintiff, who had contracted for the use of certain boats on the Great Lakes for three years, restraining the defendant from selling them or sending them into European waters, and held that the plaintiff was entitled to a specific enforcement of the contract.

4th:—

This contract and the rights of the plaintiff thereunder were so connected with and involved in the ship itself, that the requisition of the vessel under construction was a taking and appropriation of

the contract, and all plaintiff's rights under it including its equitable rights and interests.

This is true whether the United States made use of the contract thereafter or made it valueless to the plaintiff.

U. S. vs. Lynah, 188 U. S. 445.

Pumpelly vs. Green Bay Co., 13 Wallace 166.

Chappell vs. U. S., 34 Fed. 673.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685.

Cincinnati vs. Louisville & Nashville R. Co., 223 U. S. 390.

Monongahela Navigation Co. vs. U. S., 148 U. S. 312.

In U. S. vs. Lynah, it is held that where the United States by the construction of a dam in the Savannah River caused the flooding of lands belonging to Lynah to such an extent as to totally destroy their value, the lands were in contemplation of law taken and appropriated by the government.

In Pumpelly vs. Green Bay Co., the State of Wisconsin in improving the navigation of Fox River erected a dam which resulted in flooding plaintiff's land to such an extent as to impair its usefullness, and make it practically valueless, and the Court held that this was taking within the meaning of the 5th Amendment.

In Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685, the City sought to condemn the

property of the Water Company which had a contract with the Town of New Lots for hydrant rent for 25 years, and the Water Company claimed the City had no right to condemn this contract.

It was held that the contract was property and could be taken under condemnation proceedings for public use, subject to the rule of just compensation, and it was appropriated when the tangible property was condemned, and the contract thus made valueless to the owner, and the court said:

> "The true view is that the condemnation proceedings, do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses."

In Cincinnati vs. Louisville & Nashville Ry. Co. 223 U. S. 390, the question of the condemnation of a right of way for an elevated railroad across the public landing at Cincinnati which had been dedicated by the original proprietors "as a common for the use and benefit of the town forever" arose.

It was held that this dedication constituted a contract binding upon the City, but that the contract nevertheless could be condemned.

Here the Railway Company made no use of the dedication which the court said was a contract, and no use of the property for the purposes of a common, but the appropriation of it for a right of way terminated the contract to the extent of the portion of the landing taken for the right of way, at least.

In Monongahela Navigation Co. vs. U. S., 148 U. S. 312, the United States had taken over by its power of eminent domain Lock and Dam No. 7, belonging to the Monongahela Navigation Co. That Company had been granted by the legislature of Pennsylvania the right to construct dams and locks upon the Monongahela River, and the result of the construction of these dams and locks greatly increased the commerce carried upon that river and the tolls received by the Company were very valuable.

In providing for the condemnation of Lock No. 7, congress provided that nothing should be paid by the United States for the franchise to collect tolls. The physical value of the Lock and dam was found upon the trial without taking into consideration the franchise. The Company insisted that the value of the franchise must be taken into consideration.

It was held by the Supreme Court that the Company's franchise was its contract with the State, was property, and that the United States could not lawfully take over the physical property of the corporation without paying just compensation for the contract as well as for the actual physical property, and the court said:

> "Because congress has the power to take property it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner, must be paid to him before it can be said that just compensation for the property has been made. * * *

> But this franchise goes with the property and the Navigation Company which owned it is deprived of it. The government takes it away from the Company whatever use it may make of it and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect toll just compensation requires payment not merely of the value of the tangible property itself but also of that of the franchise of which he is deprived."

In this case the United States was required to pay compensation for the franchise, that is, for the contract as well as for the actual physical property taken.

In the case at bar it was conceded by the defendant and found by the Court of Claims that the Government did requisition the ship under construction.

It requisitioned then the plaintiff's equitable rights and interests in the ship springing out of the contract in any event.

And if by taking the ship it rendered the contract and the obligation of the Shipbuilding Corporation under it valueless to the plaintiff it thereby appropriated the contract, whether it used the contract thereafter or not.

IV.

Omnia Case Distinguished.

Omnia Commercial Company vs. U. S., 261 U. S. 502, does not rule the case at bar.

In that case the plaintiff owned a contract made in May 1917, under which it had the right to purchase a quantity of steel plate from the Allegheny Steel Company. In October, 1917, before any delivery had been made under the contract the United States requisitioned the entire product of the Steel Company for the year 1918, and directed that Company not to comply with the plaintiff's contract, and threatened if it did do so to take over and operate for public use its entire plant.

In that case no specific steel plate had been appropriated to the plaintiff's contract, and no part of the purchase price had been paid. The Omnia Company had no equitable title or interest in the steel plate, and specific performance of its contract could not be enforced.

Here in the case at bar the subject of the contract was a specific and definite artitcle of property—a ship under construction, specifically appropriated to and involved in the contract.

The plaintiff had paid more than half of the contract price.

The property was of such a character that the plaintiff had the right to a specific performance of the contract. It had an equitable title and interest in the ship.

There the United States dealt only with the Steel Company.

Here it dealt with both parties to the contract, the plaintiff and the Shipbuilding Company.

There the United States did not step into the shoes of the plaintiff under the contract and use it.

Here the Government took over and used the plaintiff's contract, and all the obligations of the Shipbuilding Corporation under it. It put itself in the place of the plaintiff under the contract, assumed and agreed to pay the Shipbuilding Corporation the balance of the contract price unpaid, and caused the Builder to complete the construction under the contract. The construction was so completed. The United States paid the builder the balance of the contract price, and the builder delivered the ship to the United States.

There the contract was made simply unenforcible as between the Omnia Company and the Steel Company.

Here the contract was kept alive for the use of the Government and used.

There the damages resulting to the Omnia Company were merely consequential.

Here the loss to the plaintiff was the natural, direct and inevitable result of what the defendant did.

There the contract was destroyed under the police power of the United States.

Here the contract was taken under the right of eminent domain.

This suit is a part of the authorized procedure initiated by the United States for the condemnation of the ship and all the rights and interests of the plaintiff under the contract.

Seaboard Air Line Ry. Co. vs. United States, 261 U. S. 299; 305.

V.

Just Compensation.

At the time of the requisition on August 3rd, 1917, the plaintiff was the owner of the contract for the construction of the ship made fourteen months prior to that date, under which the construction had progressed and was then progressing. The Shipbuilding Corporation had procured by commitments and actual deliveries all materials required for the construction. The plaintiff had furnished plans and specifications, and then owned an equitable title or interest in the ship under construction.

It was entitled under the contract to the delivery of the ship completed on February 1st, 1918, upon payment to the builder of the balance of the contract price, which was $412,130.

The market value of this ship on August 3rd, 1917, was $1,719,400, and its value on the 1st of February, 1918, was the same amount.

We insist that the value to the plaintiff of this contract and its rights and interest in the ship under the contract, was the difference between the value of the ship and the amount which the plain-

tiff was then required under the contract to pay in order to get it, that is, $1,719,400 less $412,130, or $1,307,270.

Just compensation is the value to the owner at the time of the taking of the property taken.

Monongahela Navigation Co. vs. U. S., 148 U. S. 312; 326.

Seaboard Air Line Co. vs. U. S., 261 U. S. 299; 304.

U. S. vs. Rogers, 257 Fed. 397; 400.

Sanitary District of Chicago vs. Pittsburgh Ry. Co., 216 Ill. 574; 584.

United States vs. New River Colleries, 262 U. S. 341; 343.

In Monongahela Navigation Co. vs. U. S. 148 U. S. 312, this Court said:

> "The question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken."

In Seaboard Air Line Ry. Co. vs. U. S., 261 U. S. 299; 304, this Court said:

> "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken.
>
> It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken."
>
> U. S. vs. Rogers, 257 Fed. 397; 400.

In U. S. vs. New River Colleries, 262 U. S. 341; 345, this Court said:

"The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken.

The war or conditions which followed did not suspend or affect the Statute or the 5th Amendment. The owner was entitled to what he lost by the taking."

In Sanitary District of Chicago vs. Pittsburgh Ry. Co., 216 Ill. 574; 584, the Court said:

"The constitution and the law require that the owner shall receive such compensation that he will be as well off after the taking as he was before. In order to do this it is necessary to determine what the property was worth to the owner, and unless he receives what it was worth to him he does not receive just compensation."

The contract was worth to the plaintiff on August 3rd, 1917, the amount above stated.

No less sum would be a full money equivalent for the property which the government took on that day from the plaintiff, and the plaintiff is entitled to interest on that amount from August 3rd, 1917.

VI.

INTEREST.

The plaintiff is entitled to interest as a part of its just compensation upon the value of the property taken from the date of the requisition.

Seaboard Air Line Ry. Co. vs. U. S., 261 U. S. 299.

United States vs. Benedict, 261 U. S. 294.

Prince Line vs. U. S. 283 Fed. 535.

U. S. vs. Rogers, 255 U. S. 163.

The plainttiff was entitled to judgment for $1,719,400 less $412,130, the balance of the contract price unpaid on August 3rd, 1917, and less $332,012.87 the amount paid by the defendant February 24, 1920, or $975,257.13, and in addition thereto interest as a part of plaintiff's damages.

We respectfully submit that the judgment of the Court of Claims should be reversed.

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